BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONNA GARMANY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,064,778
CASEY'S GENERAL STORES	)	
Respondent	)	
AND	)	
	)	
EMCASCO INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the September 17, 2014, Order for Medical Treatment entered by Administrative Law Judge (ALJ) Brad E. Avery.

APPEARANCES

Gary E. Laughlin, of Topeka, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for the respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record on appeal is the same as that considered by the ALJ and consists of the discovery deposition of claimant, dated February 15, 2013; the preliminary hearing transcript, with exhibits, dated July 23, 2013; the preliminary hearing transcript, dated May 8, 2014, with exhibits; the deposition of Harold Hess, M.D., dated July 25, 2014, with exhibits; the videotaped evidentiary deposition of Deanna Smith, dated August 7, 2014, with exhibits; the evidentiary deposition of Debra Voiers, dated August 7, 2014; the deposition of Sharon Vawter, dated August 29, 2014; the deposition of claimant, dated August 29, 2014; and the documents of record filed with the Division.

ISSUES

The ALJ found claimant suffered personal injury by accident, arising out of and in the course of her employment with respondent. The ALJ determined the injury was the prevailing factor causing claimant's medical condition, need for treatment and disability, and ordered respondent to provide medical treatment with Dr. Harold Hess.

Respondent appeals arguing this case is no more compensable now than when this Board Member ruled against claimant in a November 25, 2012, Order, and claimant should not be rewarded for falsifying her testimony. Therefore the ALJ's Order should be reversed. Respondent contends claimant's injury occurred as the result of an act of daily living or neutral risk.

Claimant argues the ALJ's Order should be affirmed.

The issues on appeal are as follows:

1. Did claimant suffer accidental injury arising out of and in the course of her employment?

2. Was claimant's work accident the prevailing factor in causing the medical condition, need for treatment and disability?

FINDINGS OF FACT

In March 2012, claimant was working for Casey's General Store in Scranton, Kansas as assistant manager. Claimant was on duty the evening of March 30, 2012, and was supposed to be running the register that evening, but an employee on the clean-up crew called in sick. Claimant attempted to call in another employee for the clean-up crew, but was unable to find anybody. She called the store manager who came in at around 8 p.m. to cover the register and claimant went to do the clean-up work, part of which was stocking the walk-in cooler.

From inside the walk-in cooler, claimant straightened up bottles on the top shelf and then began consolidating 20-ounce bottles of soda from one half-empty case to another half-empty case on the lower shelf. Claimant was squatted down with her knees bent while consolidating bottles on the lower shelf. As she stood up, she heard and felt a pop in her back and felt pain in her lower back. Claimant had nothing in her hands when she stood up. She left the cooler, notified her manager and filed an incident report. It is disputed in this record just how long claimant was squatting before standing up.

Thinking she may have pulled a muscle in her back, claimant waited a while to see if it would heal on its own. When she wasn't getting any better, claimant went to see her primary care physician, Dr. James D. Seeman, on April 17, 2012. Dr. Seeman took five

x-rays of the lumbosacral spine and scheduled claimant for an MRI of her lumbar spine. Dr. Seeman also prescribed a muscle relaxant and pain medicine. Dr. Seeman's notes reflect the x-rays did not show any intervertebral disk space issues, but did reveal what he believed to be a pars defect at the sixth lumbar vertebra. His assessment was that there was no significant degenerative disease and no definitive disc disease. In addition to the pars defect, claimant showed some slight curvature of the spine, which Dr. Seeman believed might be more due to muscle spasms than an actual structural abnormality.

Claimant's lumbar spine MRI without contrast was performed on April 17, 2012. It showed degeneration of lumbar intervertebral discs, most marked at L4-5 and L5-S1, with minimal central disc bulging at the L5-S1 level and minimally compressing the epidural fat and thecal sac at that level. No disc protrusion or spinal stenosis at the other lumbar levels was seen. No lumbar compression fractures were seen.

On April 19, 2012, Dr. Seeman's nurse placed a follow-up call to claimant to check on her progress. Claimant advised that she was no better and the prescribed pain medication was not alleviating her pain. On April 25, 2012, respondent gave claimant authorization for a pain management consultation and treatment.

Following two epidural injections in May/June, with only moderate pain relief, claimant was again seen by Dr. Seeman on July 9, 2012. As a result, Dr. Seeman scheduled claimant for a consultation with board certified orthopedic surgeon, Michael L. Smith, M.D.

On July 20, 2012, claimant was examined by Dr. Smith. He took x-rays of her back. Dr. Smith's notes revealed that claimant's radiographs showed some scoliosis across the lumbar segments, a spina bifida occulta at L5 and possibly a spondylolysis at L5. Dr. Smith recommended work conditioning and scheduled an EMG. On August 1, 2012, claimant began physical therapy at Salt Creek Fitness and Rehabilitation in Osage City, Kansas. Claimant's August 2, 2012, EMG showed no significant lumbosacral radiculopathy, plexopathy, entrapment neuropathy or peripheral neuropathy and was within normal limits bilaterally.

On August 2, 2012, claimant called Dr. Seeman's office requesting pain medication. Claimant indicated she was starting physical therapy for her back and needed pain relief to get through the physical therapy. Dr. Seeman prescribed Lortab. Claimant had physical therapy weekdays at Salt Creek Fitness and Rehabilitation starting August 1, and ending August 21, 2012.

A CT scan on September 14, 2012, revealed mild levoscoliosis of the thoracolumbar spine, bilateral spondylolysis at L5 without significant spondylolisthesis, mild annular disc bulging at L4-5 and L5-S1 and no evidence of acute fracture.

Claimant's Lortab prescription was refilled on September 17, 2012. On September 25, 2012, claimant called Dr. Seeman, requesting a stronger pain reliever, noting she just learned she had two fractured discs and advising that Dr. Smith was "going to do surgery next month after getting it cleared through workmans comp."[1] Dr. Seeman declined to prescribe a stronger pain medication at that time, but did refill the Lortab on September 27, 2012.

By letter dated October 3, 2012, Dr. Smith replied to a request from respondent's third party administrator for a diagnosis of claimant's condition. In his letter, Dr. Smith opined claimant's work incident was not the prevailing factor in the development of spondylolysis at L5, as shown on a CT study dated September 14, 2012. Dr. Smith indicated that he believed claimant's spondylolysis at L5 predated her March 30, 2012, work incident.

On November 8, 2012, claimant was again seen by Dr. Seeman. His notes reflect concern over Dr. Smith's view that claimant's injury was due to a preexisting condition. On November 26, 2012, Dr. Seeman prescribed claimant Percocet for pain. On December 27, 2012, claimant was prescribed the muscle relaxant cyclobenzaprine and her Percocet was replaced with a prescription for an increased dose of Lortab.

On April 23, 2013, at the request of claimant's attorney, Dr. Peter V. Bieri, M.D. performed an examination of claimant after considering claimant's provided history and the provided medical documentation. At that time, no x-rays were available for Dr. Bieri's review. After reviewing claimant's documentation and performing a clinical examination, Dr. Bieri noted that radiographic findings revealed changes at two levels with a diagnosis rendered consistent with spondylolysis at two levels. Dr. Bieri opined that "[w]hile the claimant may have had some element of pre-existing degenerative change of the lumbar spine, the injury in question, with the mechanism of injury specifically requiring work activity, is considered to be the prevailing factor for the diagnosis rendered."[2] Utilizing the AMA *Guides* to the Evaluation of Permanent Impairment, Fourth Edition, Dr. Bieri rated claimant with a seven percent whole person impairment for specific disorders of the lumbar spine and a four percent whole person impairment for range of motion deficits of the lumbar spine, resulting in a combined whole person impairment of eleven percent.

In a July 22, 2013, letter to respondent's attorney, Dr. Smith stated that he believed claimant's work accident "is not the prevailing factor for her lumbar spondylolysis, nor would it be for any surgery or disability related to that condition."[3]

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[1] P.H. Trans. (July 23, 2013), Cl. Ex. 1 at 19 (Dr. Seeman's Sept. 25, 2012, phone note).

[2] *Id.*, Cl. Ex. 1 at 5 (Dr. Bieri's Apr. 23, 2013, IME report).

[3] *Id.*, Resp. Ex. A.

Alexander Bailey, M.D., was asked to perform a medical record review of claimant's medical records. Dr. Bailey was specifically asked to review the records of Dr. Harold Hess with an emphasis on the testing conducted by Dr. Hess to try and determine whether there was a presence or absence of an acute disc injury of any significance, and to determine whether tests would justify surgical procedures. Dr. Bailey did not evaluate claimant in person.

Dr. Bailey determined claimant has an anatomical abnormality in the lumbar spine, a spina bifida occulta at L5 and bilateral spondylolysis. Dr. Bailey in no way believed claimant's spina bifida occulta or bilateral spondylolysis was caused by her work environment, exposure or condition. He agreed with Dr. Smith that claimant's condition predated the work incident. He noted spina bifida and spondylolysis are in utero and developmental abnormalities and spondylolysis can develop in high-level trauma, usually from falls from a significant height or motor vehicle accidents. He did not feel these conditions were related to standing from a stooped position as there is not enough force and energy in that action to cause those conditions.

Dr. Bailey stated in his report he did not have any specific data to indicate claimant did not note the onset of symptoms on or about March 2012. He indicated the mere act of standing from a stooped position did not change the natural history of claimant's condition that was going to develop regardless of the specific event or mechanism. He did not feel standing from a stooped posture is a work-related condition or injury. He indicated claimant's need for surgical intervention with Dr. Smith and claimant's need for treatment predates March 30, 2012, and the need for treatment is related to claimant's developmental abnormality and conditions. He wrote the prevailing factor for claimant's need for medical and or surgical attention predates March 30, 2012, and is a developmental and degenerative condition and not a specific work environment, condition, exposure or injury. He wrote it was clear claimant's diagnosis is spondylolysis, disc abnormalities at L4-5 and L5-S1 with a predominance of pain generation from the L5-S1 level. He listed treatment options as including a variety of conservative modalities and surgical intervention.

Claimant was deposed again on August 29, 2014. She testified that on March 30, 2012, she was in the cooler for at least 45 minutes to an hour.[4] She testified as soon as she got to the cooler, she propped the door open because she was going to be going in and out a lot. She testified when she first went in the cooler, she noticed it was a mess, as usual, and she started with her task at the far end closest to the freezer door.[5] She testified there are five different sections in the cooler, with each section having three shelves. She proceeded to push the product forward on the shelves, so that customers

[4] Claimant's (Aug. 29, 2014) Depo. at 5.

[5] *Id.* at 6.

could reach from the other side. She started on the top shelf and made her way down. Claimant testified she had to squat to get products off the bottom shelf. She testified she was in a squat position for about three or four minutes while moving product on the bottom shelf.

Claimant testified when she came to the third section she worked her way down the shelves and found the bottom shelf to be a total mess. She had to move product around and off the shelf to organize and keep the shelf stable. Claimant was at this section in the squatted position working on the third shelf for at least five or ten minutes.[6] When claimant got up from working on the bottom shelf, she heard a loud pop and felt sharp pain in her low back.[7] Claimant was not able to finish the last two sections in the cooler.

Sharon Vawter previously worked for Casey's General Stores for 16 years in management. On March 30, 2012, Ms. Vawter was called in to work the evening shift after an employee called in sick. Ms. Vawter had already completed her hours on the day shift, but returned to cover. She arrived for the evening shift at 8:15 p.m. and took over on the register so claimant could straighten and stock shelves in the cooler.

Ms. Vawter testified claimant had been in the cooler for about a half hour when claimant came out kind of bent forward with her hand on her lower back. She asked claimant what happened and claimant reported her back popped when she got up from a squatted position. Ms. Vawter admits hearing claimant say "ow" while in the cooler. She assumed claimant bumped into one of the shelves and didn't think much about it. She did not observe claimant while she was in the cooler, but she did see her take product back to the cooler. She later testified that she didn't remember what she saw claimant doing that day.

Ms. Vawter testified she doesn't recall claimant complaining of back pain or problems on the numerous occasions she worked with claimant over a five or six year period before March 30, 2012. She herself had, on many occasions, stocked and organized shelves in the cooler, and it would take her 45 minutes to an hour, sometimes longer depending how messed up the shelves were on the stock side. It would take her about 15 minutes to stock and organize the bottom shelf in the cooler. This task had Ms. Vawter on her knees for the entire 32 foot length of the cooler. Ms. Vawter testified cleaning up the cooler and stocking the cooler are pretty much the same task in her opinion.

Debra Voiers previously worked for Casey's General Stores from 2010 to August 1, 2014. At the time of her employment, her job was to clean up and stock shelves.

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[6] *Id.* at 9.

[7] *Id.* at 9-10.

Depending on the day it would take her 30 to 45 minutes to stock the cooler, and it would take her 10, sometimes 15 minutes to stock and organize items on the bottom shelf of the cooler. She was usually in a squatted position to perform this task and sometimes would get on her knees if she was hurting in the squatted position. The reason for stocking or organizing shelves was to consolidate and make room for new stock and to fill with existing stock. The bottom shelf is only four to five inches from the floor.

Deanna Smith, testified she has been the manager of Casey's General Stores in Scranton, Kansas since May 2013. Ms. Smith's job duties include scheduling, payroll, stocking, cleaning, hiring, inventory, ordering, etc. Ms. Smith's deposition was videotaped so she could provide a demonstration of the activities performed in the cooler. Ms. Smith was not the manager at the time of claimant's employment.

Ms. Smith demonstrated stocking the shelves by pulling product from stock on the right and putting it in the cooler on the left.[8] Ms. Smith testified she squats to consolidate stock in the cooler everyday. Ms. Smith testified that squatting is not necessary to stock the upper three shelves. She specifically demonstrated consolidating two half cases of 20 ounce bottles of soda on the shelves. It took Ms. Smith 15 seconds to consolidate the two half cases. She also testified she would agree with Ms. Voiers that it would take 30 to 45 minutes to restock and organize, but she clarified that this would be for the entire cooler. She was not aware Ms. Voiers took 10 to 15 minutes to stock the bottom shelf. Ms. Smith testified that the only time squatting continuously for 15 minutes is required is to stock shelves when the products in the cooler doors are completely empty. But that never happens. The option to sit and stock the bottom shelves is available to everyone and sitting or squatting are the only ways to reach the bottom shelves.

Following the ALJ's July 23, 2013, Preliminary Hearing, the ALJ, ordered an Independent Medical Evaluation with board certified neurological surgeon Harold A. Hess, M.D., of Johnson County Spine in Overland Park, Kansas.

When claimant met with Dr. Hess on August 9, 2013, he noted claimant had been working at Casey's on March 29, 2012[9], and had been squatting for 15 minutes stocking sodas. Dr. Hess testified claimant did not tell him she was loading the cooler while repetitively lifting up to 50 pounds, on top of working in a squatting position. The history of heavy lifting was presented to Dr. Bieri. Claimant had already been evaluated by several doctors by the time she met with Dr. Hess, and she had also undergone two lumbar

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[8] The cooler is 32 feet long and 6 feet wide.

[9] As noted by th ALJ, claimant referred to March 29, 2012, in portions of the record, most notably in her discovery deposition and her conversation with Dr. Hess. However, since the contemporaneous records refer to an accident date of March 30, 2012, the ALJ found it is more than likely the date of accident is March 30, 2012.

epidural injections. The purpose of the injections was to reduce the swelling of the nerves in the spine.

Claimant reported occasional medial left thigh pain to Dr. Hess, but her focus was her back pain. The leg pain was not of much importance to Dr. Hess, because claimant's pain was axial and discogenic. The radicular component is not typically part of that.[10]

Dr. Hess noted claimant's CAT scan showed she had non-symptomatic spina bifida. Dr. Hess noted claimant's MRI showed L4-5 and L5-S1 degenerative disc disease. Dr. Hess believes claimant had degenerative disc disease and bilateral spondylolysis that predated March 29, 2012. He later testified claimant definitely had degenerative disc disease prior to the injury. He wouldn't agree she had a prior annular tear and had no way of knowing currently if she had actually had a tear. After the original examination, Dr. Hess determined that his diagnosis of an annular tear could not be confirmed absent a lumbar discogram at L3-4, L4-5 and L5-S1. Dr. Hess recommended claimant undergo an L5-S1 anterior lumbar discectomy interbody fusion with cage implantation, banked bone implantation and anterior tension band instrumentation. This Board Member who decided the original appeal, noted the lack of medical support for Dr. Hess' diagnosis of an annular tear and his concerns therein.

Claimant met Dr. Hess again on May 23, 2014. She continued to complain of pain across her low back with pain down her legs and occasional numbness in her low back and occasional weakness in both legs. At the time of this examination, Dr. Hess had for his review the results of the lumbar discogram performed by Dr. Curtis Johnson. A significant annular tear was noted at L5-S1 with a smaller annular tear at L4-5.

Dr. Hess examined claimant and opined she had L5-S1 discogenic pain with an annular tear. He opined that although claimant's discogenic pain can be degenerative in nature, she had no history of significant low back pain prior to her work-related injury. He stated that claimant's squatting in the cooler for 15 minutes and then standing up caused her back to pop and experience severe pain in her low back. He opined that, within a reasonable degree of medical certainty, claimant's annular tear occurred at the time she stood up and led to her current diagnosis. He went on to opine the work-related injury is the prevailing factor in claimant's current symptoms and medical condition.

Respondent's counsel pointed out that prior to the start of Dr. Hess' July 25, 2014, deposition, claimant's counsel contacted Dr. Hess, who was appointed by the Court, to arrange for a pre-deposition discussion. Respondent counsel was not aware of the request and was not invited to join the pre-deposition meeting. Dr. Hess testified he and claimant's counsel talked about his CV and about the report and whether he still felt the work-related injury could have caused claimant's current condition. Dr. Hess charged claimant's

[10] Hess Depo. at 15.

counsel $75 for the almost five minute meeting. Claimant's counsel, on cross-examination, confirmed the conversation between himself and Dr. Hess was about the doctor's CV and his qualifications.

Dr. Hess was questioned extensively about how long claimant was standing in the cooler and whether standing up would cause an annular tear:

> Q. And your initial conclusion, based on what you had available to you, was that the act of standing up likely produced an annual tear; correct?
>
> A. Not just the act of standing up, but the act of being squatted for 15 minutes loading -- or rearranging a cooler and then standing up.
>
> Q. Are you aware that you're the first doctor that Ms. Garmany is documented as having reported that she squatted for 15 minutes continuously?
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> . . .
>
> A. I don't recall if it was documented by another doctor about that.
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> Q. (By Mr. Laskowski) Well, if that was what she thought was the problem, wouldn't you have expected her to report that to the doctors if she was apparently capable of recalling that for your benefit?
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> . . .
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> A. If she thought it was part of the problem, I would expect her to report it, but, again, it leads to the part, as I mentioned earlier, as to how accurately somebody else detailed what she reported.
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> Q. (By Mr. Laskowski) Ms. Garmany testified in her original deposition when asked what she was doing she said, "I went into the cooler because we have to straighten up the cooler and stock everything. I noticed on the bottom shelf there were two cases of the same item, and there's like, a half a case of soda in each. I squatted down to consolidate, and when I stood up I felt and heard a pop in my back."
>
> Is that different than what he told you?
>
> A. No. I don't know how long it took her to -- she doesn't state in the deposition how low she was squatting.[11]

Dr. Hess did not believe it would take him 15 minutes to stock a case and a half of 20 ounce bottles, but having not performed the job he couldn't testify that would be true for everyone. Dr. Hess testified his opinion would change if claimant had been squatting for

[11] Hess Depo. at 17-18.

less than 10 minutes as an injury would be less likely then. He acknowledged persons with unhealthy discs are more likely to suffer an annular tear or have discogenic pain from light activity than someone with healthy discs.

Dr. Hess agreed one could have an annular tear and not be symptomatic. He agreed with Dr. Smith's diagnosis of spondylolysis, but not with the treatment recommendation for a decompression of L5-S1, as the MRI clearly showed there was no nerve root compression. He rationalized that with no compression there is no need for decompression. Dr. Hess recommended a L5-S1 fusion and an external bone growth stimulator. His recommendation for surgery was based on claimant's discogenic pain.

Dr. Hess' impression was there was some causal relationship between the discogenic pain and the work claimant had been performing in the cooler for 30 minutes. Dr. Hess testified that had claimant had a history of low back pain that was exacerbated by her squatting and then standing up, the work injury would have had no relation to her current symptoms.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(B)(3)(A) states:

> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury

> may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
> . . .
> (B) An injury by accident shall be deemed to arise out of employment only if:
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
> (3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
> (iii) accident or injury which arose out of a risk personal to the worker; or
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-508(g)(h) states:

> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

In an earlier decision dated November 25, 2013, the undersigned Board Member rejected the causation opinion of Dr. Hess due to a speculative diagnosis of an annular tear. Dr. Hess acknowledged his diagnosis could not be confirmed without a lumbar discogram. At this time the discogram has been performed and verified the existence of the annular tear. This verification of Dr. Hess' diagnosis adds support to his opinion that claimant's need for medical treatment stems from the work-related accident on March 30, 2012.

An injury occurring at work is not compensable under workers compensation unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.[12] The Kansas Supreme Court has ruled that an injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is performed and the resulting injury. The focus of the

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[12] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 789, 147 P.3d 1091 (2006), *rev. denied* 281 Kan. 1378.

inquiry should be on whether the activity that resulted in the injury was connected to, or was inherent in, the performance of the job.[13]

In his deposition, Dr. Hess identified the squatting described by claimant as impacting the load on claimant's low back. It was this squatting, coupled with the standing up that led to claimant's annular tear.

It is acknowledged the simple act of standing is a normal activity of day-to-day living, and generally not compensable. However, if the employment "exposes the worker to an increased risk of injury of the type actually sustained," the accidental injury can be found compensable.[14] Here, the act of squatting for several minutes straight does not constitute a normal action found in day-to-day living.

This Board Member finds the annular tear suffered by claimant constitutes a new injury which arose out of and in the course of claimant's employment with respondent. Additionally, the accident of March 30, 2012, was the prevailing factor causing claimant's injuries, medical condition and disability. The Order of the ALJ granting benefits in this matter is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has proved her accident on March 30, 2012, arose out of and in the course of her employment with respondent and is the prevailing factor causing her injuries, medical condition and disability.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated September 17, 2014, is affirmed.

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[13] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 592, 257 P.3d 255 (2011).

[14] *Id.*

[15] K.S.A. 2013 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of November, 2014.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge